Supreme Court, U.S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1455

ALEXANDER KULIK,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ALEXANDER KULIK

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INDEX

	Page
Table of Cases	iii
Opinion Below	2.
Jurisdiction	2.
Question Presented For Review	2.
Importance Of The Question Presented	3.
Constitutional Provision Involved	4.
Statement Of The Case	4.
Argument	
I The Search Warrant Was Not Supported By Probable Cause To Believe The GMC Truck Contained Evidence.	11.
A. The Affidavit Set Forth Solely The Officer Affiant's Belief Evidence Would Be Found In The Pickup; Mere Belief Is Insufficient For Probable Cause.	11.

B. The Affidavit Failed To Provide Any Nexus To The GMC Vehicle As To Provide Probable Cause To Believe It Contained Evidence. 15.

II The Officers Needed A Warrant To Enter The Condominium To Arrest Elsie Kulik When They Were Aware Of Her Presence For Two Days Prior To Entry. 18.

CONCLUSION 19.

TABLE OF CASES

Cases: Page

Aguilar v. United States, 378 U.S. 108, 112, n. 3 (1964) 12

Arkansas v. Sanders, ___ U.S. ___, 99 S.Ct. 2586, 2591 (1979) 14

Byars v. United States, 273 U.S. 28, 29 (1927) 13

Cardwell v. Lewis, 417 U.S. 583, 590 (1974) 13, 15

Carroll v. United States, 267 U.S. 132, 155-56, 158-59 (1925) 14

Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971) 14

Franks v. Delaware, 438 U.S. 154, 165 (1978) 12

Giordenello v. United States, 357 U.S. 480, 485-86 (1958) 12

Goldsmith v. United States, 439 U.S. 913 (1978) 19

Grau v. United States,
287 U.S. 124, 127 (1932) 13

Nathanson v. United States,
290 U.S. 41, 47 (1933) 12

Payton v. New York,
No. 78-5420 18

People v. Pellegrin,
78 Cal.App.3d 913
916-17, 144 Cal.Rptr.
421, 424 (1977) 17

People v. Ramey, 16 Cal.3d
263, 275 19

People v. Scott, 259 Cal.
App.2d 268, 277 17

Ravin v. State (Alaska 1975),
537 P.2d 494 16

Riddick v. New York,
No. 78-5421 18

Spinelli v. United States,
393 U.S. 410, 417-18
n. 5 (1969) 12, 13

United States v. Chadwick,
433 U.S. 1, 12-13 (1977) 14

United States v. Prescott,
581 F.2d 1343 (9th Cir.
1978) 10, 18

United States v. Reed,
575 F.2d 412, 417-22
(2 Cir.) 19

Warden v. Hayden, 387 U.S.
294, 307 (1967) 16

Zurcher v. Stanford Daily,
436 U.S. 547,556-57,
n. 6 (1978) 12

United States Code:

§ 1254(1) 2

United States Constitution:

IV Amendment 4

California Health and Safety:

§ 11357(b) 16

California Penal Code:

§1000.5 17
§1000, et seq. 16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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_____

Petitioner, Alexander Kulik, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered February 14, 1980.

OPINION BELOW

The Ninth Circuit Court of Appeals entered its decision, No. 78-3053, on February 14, 1980, denying petitioner's timely Petition for Rehearing and Request for Rehearing En Banc. A copy of the Order is attached as Appendix "A". An Order denying petitioner's appeal was originally entered on May 24, 1979. A copy of the original order is attached as Appendix "B".

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

1) Whether there was probable cause under the Fourth Amendment to issue a search warrant for a GMC pickup where the only fact presented to the magistrate linking the pickup to unawful activity was the affiant's belief?

2) Whether a warrant was needed to enter the residence to arrest a fugitive when the officers knew such person was there continuously for two days prior to their entry?

IMPORTANCE OF THE QUESTION PRESENTED

The Fourth Amendment provides that search warrants shall not issue but upon "probable cause". This Court has consistently held that the term "probable cause" means more than the good faith hunch or suspicion of a law enforcement officer seeking to invade the privacy of a citizen's effects to search. Hence, this Court has consistently required that facts, as opposed to the officer's belief, are the touchstone of probable cause.

Petitioner seeks review so that the issue of the quantum of facts and evidence necessary under the circumstances of this case as it relates to automobiles can be decided. An automobile, at times, carries with it the same sanctity of privacy as one's dwelling or suitcase when it is used as a repository of personal items and it is no longer mobile.

The Fourth Amendment's requirement that a search warrant not issue but upon probable cause would be eviscerated if an officer's belief is substituted for facts establishing unlawful activity. An averment that one who was once arrested for possession of narcotics or is suspected of a homicide would, coupled with the officer's belief, subject all his property to an open season by officers who desired to continue searching for evidence.

Further, petitioner has raised the issue of whether a warrant is necessary to apprehend a fugitive in a house when officers have probable cause to believe she is in the dwelling. This issue is currently before the Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT OF THE CASE

On December 14, 1977, Newport Beach Officer Lee Roberts swore out an affidavit for search warrants to search a condominium and two vehicles (a GMC pickup and a Cadillac Deville) in Carlsbad, California. The affidavit indicated that the officers were in Carlsbad on December 13, 1977, at the condominium at 2412 Altisma Way, Apartment "F" for the purpose of locating fugitive Elsie Kulik on a

$500,000.00 bench warrant issued November 17, 1978, by the Orange County Superior Court on a conspiracy to commit murder offense. The affiant, Newport Beach Police Officer Lee Roberts, stated he observed Elsie Kulik on December 13 and she did not leave the residence at any time. Roberts caused to have the condominium placed under constant surveillance. Elsie Kulik was not observed to leave the condominium. On December 14, the affiant and five other police officers knocked on the door and demanded to arrest Elsie Kulik on the Orange County arrest warrant. Her husband, Alexander Kulik, stated she was not there; he was arrested for harboring a fugitive.

The affidavit indicated the officers commenced a floor to floor search of the 3 floor condominium. While searching the second floor level for Mrs. Kulik, a small amount of loose marijuana was observed on a coffee table. The affiant opined it was his "experience that persons who use marijuana keep an additional supply hidden for personal use and for sale in their homes and in their vehicles." The affiant requested to search for items that were used in the packaging of marijuana, "such as baggies and it has been your affiant's experience that persons who use and sell marijuana will keep scales to weigh substances which are sold or purchased."

The affiant stated that he had received information from another Newport Beach officer that Alexander Kulik had been arrested on October 22, 1977, in Orange County with a pound of heroin and was charged with possession for sale.

A further search of the condominium, indicated a .22 caliber rifle underneath the bed on the third level and a cylinder portion of a hypodermic syringe, without the plunger or needle. Elsie Kulik was arrested hiding in a crawl hole in the bedroom area dressed in a nightgown.

A further search of the apartment revealed two file boxes labeled "PDI" which stood for Prasadam Distributing Incorporated, a business involved in the homicide investigation. The affiant was aware that an investigation was being conducted by another Newport Beach officer involving the death of Steven Bovan who was shot numerous times with a .9 mm weapon. Bovan subsequently died.

The affiant related that he had been told that Alexander Kulik was kidnapped by Bovan and others and subsequently ransomed for $100,000.00. After Alexander Kulik's release, various persons met at PDI and $25,000.00 was offered to Anthony Marone, Jr., Anthony Marone, Sr.,

Frank Rossi, Jerry Fiori and Ray Resco for the kidnap and murder of Bovan and two others. Alexander Kulik made this offer and Elsie Kulik and others joined in it in order to get revenge for Alexander Kulik's kidnapping.

The affiant indicated that there were tape recording devices in each room of PDI and there were recordings made of conversations. An earlier search warrant to search the offices of PDI was unsuccessful because it was determined that the tapes were moved to other offices.

Further efforts were made to locate the kidnappers including traveling to San Diego with expense money being paid to Marone, Jr., Rossi, Fiori and Resco.

It was the affiant's opinion that the documents and tape recordings corroborating the homicide investigation were presently located in the file boxes which were located in the Altisma condominium.

The affiant found fictitious identification in the name of Albert Helms on Alexander Kulik when he was arrested. Roberts related that he "received information from official law enforcement sources" that the GMC pickup has been driven by Alexander Kulik "in the recent past". The affiant observed this vehicle parked in

the garage of the premises. Roberts also observed Alexander Kulik driving the Cadillac Deville during the time he had the residence under surveillance. (December 13 and 14, 1977).

This pickup was registered to Albert Helms according to California Motor Vehicle records.

The affiant concluded that based upon his "training and experience" , he knew that "persons who possess marijuana, false identification, and other evidence of crimes often carry and store these items in their homes as well as their vehicle" (sic).

The affidavit concluded by seeking a search warrant for seizure of "said property, or any part thereof, from the above-described premises."

A San Diego municipal court judge issued the search warrant authorizing the search to include all rooms, storage areas and out buildings of the Altisma address, along with the Cadillac Deville and the 1977 GMC pickup for the following personal property: "narcotics, including but not limited to marijuana, paraphernalia for the sale, use and transfer of marijuana, including but not limited to baggies, sales records, wrapping paper, tape, papers, documents and effects which show possession, dominion and control

of said premises, including but not limited to keys, rental receipts, mail envelopes and monogrammed clothing, and tape recordings, receipts, phone messages, cancelled check stubs that would indicate that Alexander Kulik and Elsie Kulik hired other persons to kill Steven Bovan, and records from Prasadam Distributing Incorporated."

Numerous items were seized from the Altisma residence. Seized from the air cleaner of the GMC pickup was 13 ounces of heroin which formed the basis of the conviction for which petitioner stands convicted and seeks a petition for writ of certiorari to this Court.

On December 16, 1977, petitioner and his wife were indicted on two counts in United States District Court for the Southern District of California with conspiracy to possess with intent to distribute and possession of 13 ounces of heroin with intent to distribute.

On February 24, 1978, a motion to suppress evidence was filed by petitioner in the district court. It was denied on February 27, 1978. Petitioner was convicted on July 31, 1978, on count two pursuant to a written stipulation. On September 5, 1978, petitioner was sentenced to four year's imprisonment and a ten year special parole term. The government

dismissed count one as to petitioner and both counts as to Elsie Kulik.

Notice of appeal was filed September 6, 1978. Petitioner is currently incarcertated, having voluntarily moved to have his previously set appeal bond exonerated.

During the pendency of the appeal, petitioner filed a Motion to File A Supplemental Brief and a Supplemental Brief Based on State Court Judgment. 1/

At oral argument, petitioner raised the propriety of the entry into the condominium to arrest Elsie Kulik without a warrant, citing United States v. Prescott, 581 F.2d 1343

1/ The supplemental brief alleged that a California superior court had ruled on the same affidavit involved herein at petitioner's motion to suppress evidence in state court. The state court ruled that the warrant was unlawful both under the Fourth Amendment and the California Constitution. Petitioner's arguments that the state court judgment should be given deference and full faith and credit was not reached by the Circuit Court of Appeals and consequently will not be raised herein.

(9th Cir. 1978).

On May 24, 1979, the circuit court affirmed petitioner's conviction. The circuit voted two to one for conviction, Judge Ely dissented, holding that the affidavit was insufficient to authorize searching of the GMC pickup. (Appendix "B").

A timely filed petition for rehearing and rehearing en banc was denied February 14, 1980. (Appendix "A").

ARGUMENT

I

THE SEARCH WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE TO BELIEVE THE GMC TRUCK CONTAINED EVIDENCE.

A. The Affidavit Set Forth Solely The Officer Affiant's Belief Evidence Would Be Found In The Pickup; Mere Belief Is Insufficient For Probable Cause.

Because the officer affiant observed a small quantity of marijuana in the condominium, he stated it was his "experience that persons who use marijuana keep an additional supply hidden for personal use and for sale in their homes and vehicles".

The affiant observed a GMC pickup parked in the garage that had been driven by petitioner in "the recent past," along with a more recently driven Cadillac. The affiant concluded based upon his training and experience that he knew that "persons who possess marijuana, false identification, and other evidence of crime often carry and store these items in their home as well as their vehicle" (sic).

No facts were alleged to indicate how either vehicle related to unlawful

activity, or how the affiant knew a causal relationship between the objects to be searched and the objects sought existed.

Probable cause for a search warrant requires the same degree of certitude as probable cause to arrest. Zurcher v. Stanford Daily, 436 U.S. 547, 556-57, n. 6 (1978); Spinelli v. United States, 393 U.S. 410, 417-18, n. 5 (1969); Aguilar v. United States, 378 U.S. 108, 112, n. 3 (1964); Giordenello v. United States, 357 U.S. 480, 485-86 (1958); Ex Parte Burford, 7 U.S. (3 Cranch) 451-52 (1806). Both arrest and search warrants must set forth facts and not just the officer's belief that probable cause to arrest or search exists. A simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause. Spinelli v. United States, supra, at 418.

Here, the affiant officer set forth no facts or circumstances to show that petitioner's vehicle was involved in unlawful activity. This Court on several occasions has held mere affirmance of belief or suspicion is insufficient to support probable cause to issue a search warrant. Facts must be presented. Nathanson v. United States, 290 U.S. 41, 47 (1933); Franks v. Delaware, 438 U.S. 154, 165 (1978).

> "If an officer simply avers, without more, that there is [illegal evidence], the warrant should not issue, even though the belief is an honest one, as evidenced by his oath, and even though the magistrate knows him to be an experienced, intelligent officer who has been reliable in the past." Spinelli, supra, at 423 (White, J., concurring); see also, Grau v. United States, 287 U.S. 124, 127 (1932); Byars v. United States, 273 U.S. 28, 29 (1927).

An automobile is entitled to the same Fourth Amendment safeguards and privacy considerations as an individual's home or suitcase, when the automobile is considered by the police as a repository for personal effects. This Court has normally considered a search of an automobile for less intrusive on the privacy rights protected by the Fourth Amendment than the search of one's person or home. Cardwell v. Lewis, 417 U.S. 583, 590 (1974). The Court reasoned that one has a "lesser expectation of privacy in a motor vehicle because its

function is transportation and it seldom serves as one's residence or as the repository of personal effects". Id. 2/

Contrary to the reasoning in Cardwell, supra, the affiant officer felt that vehicles were, in his experience, used to keep marijuana and other evidence of crime. Since the search sought to be authorized here was of the entire vehicle and its contents, the Fourth Amendment's requirement of probable cause must be the same quantum as to any other area where one has a reasonable expectation of privacy in his personal effects. Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971); Carroll v. United States, 267 U.S. 132, 155-56, 158-59 (1925). Since the intrusion sought the search of every nook and cranny of the

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2/ Automobiles have traditionally been accorded lesser Fourth Amendment privacy protection because of their mobility and regulation and use. Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586, 2591 (1979); United States v. Chadwick, 433 U.S. 1, 12-13 (1977). However, in petitioner's case, both petitioner and his wife were under arrest and the vehicle was in the garage. The affidavit contained nothing to show any personal material was observed in plain sight in the GMC or Cadillac.

automobile was no severe, the right to privacy is correspondingly greater. Cardwell v. Lewis, 417 U.S. at 573, n. 9.

Without more, a search warrant cannot be constitutionally supported when the facts used to support it are the officer's beliefs which show no unlawful activity involving petitioner with the automobile or the automobile itself.

B. The Affidavit Failed To Provide Any Nexus To The GMC Vehicle As To Provide Probable Cause To Believe It Contained Evidence.

The affidavit set forth that a small amount of marijuana, a plunger, some records relating to a murder investigation, a .22 rifle, and false identification were found in the residence. The GMC and Cadillac were related to the residence solely by petitioner's ownership under different names - a circumstance which is not unlawful. The affiant had observed petitioner drive the Cadillac the day before the search. Law enforcement sources told the affiant petitioner had driven the GMC truck "in the recent past". This innocent activity is insufficient to allow a search warrant's issuance.

Petitioner is aware of no case where this Court has authorized a search warrant under such meager facts and circumstances, where the affidavit sets fourth no activity related to the automobile except that it was driven in the recent past.

There must be a nexus between the item to be seized and criminal behavior. Warden v. Hayden, 387 U.S. 294, 307 (1967). The only nexus alleged by the affiant here was his own experience. As stated previously, ante "A", the officer's belief is insufficient.

The criminal behavior of possession of a small quantity of marijuana does not lead a California police officer to logically conclude other amounts are concealed in an automobile. This conclusion has been rejected by the California legislature which recently amended California Health and Safety Code Section 11357(b) to provide that possession of a ounce of marijuana is punishable as an infraction with a maximum $100.00 fine. 3/ Further, the California legislature, by enacting Penal Code Section 1000, et seq,

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3/ One state has held that possession of small amounts of marijuana within the home is constitutionally protected by the right to privacy. Ravin v. State (Alaska 1975), 537 P.2d 494.

commonly known as the "diversion" statute, has provided that possessors of small amounts of marijuana are considered fit candidates for rehabilitation whose cases would ultimately be dismissed. Calif. Pen, C. §100.5. The fact that a marijuana plant is growing does not justify the conclusion that one who cultivates marijuana possesses it in his residence, garages or outbuildings. People v. Pellegrin, 78 Cal.App.3d 913, 916-17, 144 Cal.Rptr. 421, 424 (1977). 4/

The other facts related in the affidavit provide no further support for any nexus: false identification, a syringe plunger, and a rifle add nothing. Since there was no allegation set forth in the affidavit of any connection between the item to be seized and criminal behavior, the evidence seized pursuant to search of the pickup must be suppressed under the Fourth Amendment.

4/ See also, People v. Scott, 259 Cal. App.2d 268, 277, 66 Cal.Rptr. 257 (1968).

II

THE OFFICERS NEEDED A WARRANT TO ENTER THE CONDOMINIUM TO ARREST ELSIE KULIK WHEN THEY WERE AWARE OF HER PRESENCE FOR TWO DAYS PRIOR TO ENTRY.

Newport Beach officers while executing an Orange County arrest warrant, were present in Carlsbad in San Diego County for two days before attempting to arrest petitioner's wife. Without attempting to secure a warrant from the local San Diego magistrate, the officers entered the condominium, arrested petitioner and commenced a thorough floor by floor search to determine if Mrs. Kulik was present.

The issue of whether a warrant is required to arrest a person in a home, where there already exists probable cause to arrest, is currently before this Court. Riddick v. New York, No. 78-5421; Payton v. New York, No. 78-5420; see also United States v. Prescott, 581 F.2d 1343, 1348-49 (9th Cir. 1978); 5/ United States v.

5/ Petitioner cited Prescott at oral argument and the circuit court considered it. (Appendix "B").

Reed, 572 F.2d 412, 417-22 (2 Cir.) cert. denied, sub-nom Goldsmith v. United States, 439 U.S. 913 (1978); People v. Ramey, 16 Cal.3d 263, 275, 127 Cal.Rptr. 629, 636, 545 P.2d 1333, 1340, cert. denied 429 U.S. 929 (1978).

Since this issue has been recently fully briefed and argued before this Court, it would serve no purpose to restate those arguments. Petitioner relies onthe briefs, arguments and cases cited above as there is no dispute on the facts.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: MARCH 14, 1980

PHILIP A. DeMASSA,
Attorney for Petitioner
Alexander Kulik

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- ALEXANDER KULIK, Defendant-Appellant.	)	No. 78-3053 O R D E R

Before: ELY, WALLACE and PREGERSON, Circuit Judges

The majority of the panel as constituted above has voted to deny the petition for rehearing; Judge Ely has voted to grant panel rehearing. Judges Wallace and Pregerson have voted to reject the suggestion for rehearing en banc, and Judge Ely has recommended rejection of the same.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
FEB 1 - 19..
RICHARD H. DEMME
CLERK, US COURT OF APPEALS

APPENDIX "A"

FILED

MAY 24 1979

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- ALEXANDER KULIK, Defendant-Appellant.	)	No. 78-3053
	)	ORDER

Appeal from the United States District Court
for the Southern District of California

Before: ELY and WALLACE, Circuit Judges,
and PREGERSON,* District Judge

After considering the sufficiency of the affidavit and search warrant and the Prescott issues, we conclude that the trial court correctly ruled on Kulik's motion to suppress. The conviction is affirmed. Judge Ely believes that the affidavit was insufficient to authorize the search of the pickup and therefore dissents.

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

APPENDIX "B"

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF SAN DIEGO) ss.

GRACE M. FOLKS, after first being duly sworn, deposes and says:

That on March 14, 1980, she served a copy of the PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT by placing a true copy of same by depositing same in an envelope, postage pre-paid, first class, in a mailbox regularly maintained by the United States Post Office and address as follows:

Solictor General of the
United States
Department of Justice
Washington, D. C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 1980, at San Diego, California.

OFFICIAL SEAL
ARLENE F. GREENBERG
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires October 16, 1981

GRACE M. FOLKS

Sworn and subscribed before me this 13th day of March, 1980.

Arlene F. Greenberg
Notary Public in and for said State and County